

21 March 1985

ARTICLE APPEARED

ON PAGE 30

How Ex-Officials Profit From the Not-So-Public Record

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In 1979, Henry Kissinger published the first volume of his memoirs, a thick book crammed with documents and classified materials culled from government files. The initial question raised by the book, and others like it since then, was this: Should high government officials be allowed to profit from being on the public payroll?

There are other concerns as well. Not only are high public officials allowed to profit from information generated by public money, but by monopolizing this information they are increasingly capable of controlling the history of their own policy making. This undermines history. It also denies the present generation information needed to make vital decisions regarding the conduct of public policy.

How is this possible? The simple answer is that the laws are ineffectual and the Supreme Court far too lenient.

By the time Mr. Kissinger left public office, hundreds of pages in official government documents, including many classified materials, were removed from public files and squirreled away in the Westchester residence of Mr. Kissinger's quondam mentor, Nelson Rockefeller.

When the first volume of Mr. Kissinger's memoirs reached bookstores, many scholars realized that it was bursting with classified materials and other documentation not readily available to journalists and scholars. One such scholar was Theodore Draper, a professor at Princeton's prestigious Institute for Advanced Study. Mr. Draper, wondering how Mr. Kissinger could make use of classified documents "on such a large scale and of such recent vintage," wrote the State Department figuring that materials declassified for Mr. Kissinger would be declassified for all. He was told, however, that only the portions of the classified documents quoted by Mr. Kissinger had been declassified. "By means of this dodge," he later wrote, "no one else can gain access to these documents to determine how faithfully" they were used.

"It is deeply wrong," Mr. Draper said. "If you declassify for Kissinger, you have to declassify for everybody. For historians it is a most vicious system."

The idea here, however, is not to impugn the reputation of just one man. Former Presidents Nixon, Ford and Carter, former Secretary of State Alexander Haig, former national security adviser Zbigniew Brzezinski—all have written books relying heavily on access to documentation that was not afforded regular citizens.

"It's a complete joke," said an archivist at the National Archives. "They're allowed to take almost anything they want. Then all they have to do is deposit the papers at the Library of Congress and stipulate who can and cannot see them."

"Many of the materials we have are classified," said a reference librarian in the Library of Congress's manuscript division. "Depositors are able to deny access to others. We don't check to see if materials are personal or not."

Officials are able to resort to a number of simple ruses such as this to maintain exclusive control over massive amounts of classified documentation regarding the conduct of public policy. Above a certain level there is a practical freedom for high officials to declassify. "There isn't any question," said a State Department official who asked to remain anonymous, that "access rights for high officials is a benefit associated solely with rank."

"Of course it's a big problem, and everybody does it," said former national security adviser McGeorge Bundy, referring to the general problem of privileged access to official documentation. "But there is nothing I can see that can be done about it." Former Secretary of Defense James Schlesinger, who had agreed to comment for this article, later thought better of it; his assistant said that, "A lot of people have violated the laws in this respect and he feels that it would be better not to go on the record with any comments."

That the system is ineffectual is clear. That the law conceivably could be used in the poisoning of history is shown in a case now before the Supreme Court. In this example, copyright law is being used by former President Ford to enforce a property right exerted over information generated by his office, even though it is a general principle of law that "that which is generated, created, produced or kept by a public official . . . belongs to the government and may not be considered the private property of the official."

The publisher of President Ford's "A Time to Heal" is suing The Nation, a weekly magazine that published an article using a leaked copy of the book. When the case was before the New York Court of Appeals, the court decided that allowing Mr. Ford copyright protection over the information of his office would "empower public officials to take private possession of the most important details of a nation's historical and political life."

Historians are rightly alarmed by the

present situation. "We deplore this practice," said Samuel R. Gammon, executive director of the American Historical Association. "It's a problem that worries historians. It's also a matter of some concern [insofar as] how much an official should be able to profit retroactively."

"In effect, presidents and other public officials are able to write the first draft of history before anyone else gets access to the same materials," says Floyd Abrams, a noted First Amendment lawyer.

A few relatively simple measures could go a long way toward injecting some equity into this situation:

Present practices at the State Department are too lackadaisical. Researchers hired by former officials are permitted unrestricted and unsupervised access to official documentation that opens up the system to simple abuse. A program for special access for legitimate scholars, which was eliminated in 1975 when Freedom of Information Act laws were strengthened, should be reinstated.

The power and independence of the National Archives need to be augmented. New legislation recently passed will make the archives an independent agency with its own legal department as of April 1. Previously, the archives had to rely on the General Services Administration for legal counsel. The frugality with which this was meted out crippled the archives' efforts at pursuing documentation illegally removed from government files. The new agency will need further support in order to operate effectively.

Existing laws, such as the Federal Records Act, to name just one, need to be re-examined by Congress. Currently, many of the laws are toothless tigers; their language is vague and circumvention is relatively easy.

Without a concerted effort to overhaul the present system, former high officials increasingly will be able to control the history of their own policy making. "The result," writes Theodore Draper, "can only be the corruption of journalism, the corruption of history and the corruption of the democratic process."

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